STATE OF MICHIGAN

COURT OF APPEALS

CHOICE FOODS, INC.,

Plaintiff-Appellant,

v

AUTO OWNERS INSURANCE COMPANY,

Defendant-Appellee.

UNPUBLISHED
May 4, 2004

No. 244790
Wayne Circuit Court
LC No. 02-213189-CK

Before: Cavanagh, P.J., and Murphy and Smolenski, JJ.

PER CURIAM.

Plaintiff appeals as of right from a circuit court order granting defendant's motion for summary disposition. We reverse and remand. This appeal is being decided without oral argument pursuant to MCR 7.214(E).

Plaintiff, a food wholesaler, lost inventory and business income when the power to its building was shut off due to nonpayment of the electric bill. Its equipment was damaged by a power surge when electricity was restored. The trial court ruled that benefits were precluded under the policy's off-premises services exclusion. The trial court's ruling on a motion for summary disposition is reviewed de novo. *Kefgen v Davidson*, 241 Mich App 611, 616; 617 NW2d 351 (2000). The construction and interpretation of an insurance policy and whether the policy language is ambiguous are questions of law that are also reviewed de novo on appeal. *Henderson v State Farm Fire & Cas Co*, 460 Mich 348, 353; 596 NW2d 190 (1999).

An insurance policy is much the same as any other contract. It is an agreement between the parties in which a court will determine what the agreement was and effectuate the intent of the parties. *Auto-Owners Ins Co v Churchman*, 440 Mich 560, 566; 489 NW2d 431 (1992). When determining what the parties' agreement is, the court should read the contract as a whole and give meaning to all the terms contained within the policy. *Royce v Citizens Ins Co*, 219 Mich App 537, 542; 557 NW2d 144 (1996). If the insurance contract sets forth definitions, the policy language must be interpreted according to those definitions. *Cavalier Mfg Co v Employers Ins of Wausau (On Remand)*, 222 Mich App 89, 94; 564 NW2d 68 (1997). If a term is not defined in the policy, it is to be interpreted in accordance with its commonly used meaning. *Henderson*, *supra* at 354. Clear and unambiguous language may not be rewritten under the guise of interpretation. *South Macomb Disposal Auth v American Ins Co (On Remand)*, 225 Mich App 635, 653; 572 NW2d 686 (1997). Courts may not create ambiguities where none exist, but must construe ambiguous policy language in the insured's favor. *Id*.

Policy language is ambiguous when, after reading the entire document, its language can be reasonably understood in different ways. *Royce*, *supra*. "However, if a contract, even an inartfully worded or clumsily arranged contract, fairly admits of but one interpretation, it may not be said to be ambiguous or fatally unclear." *Michigan Twp Participating Plan v Pavolich*, 232 Mich App 378, 382; 591 NW2d 325 (1998). Likewise, a policy is not rendered ambiguous by the fact that a relevant term is not defined. *Henderson*, *supra* at 353.

Under the Building and Personal Property Coverage form, defendant agreed to pay for loss of or damage to covered property "caused by or resulting from any Covered Cause of Loss." Under the Business Income Coverage form, defendant agreed to pay for loss of income if there is a suspension of business caused by a loss or damage to property "caused by or resulting from any Covered Cause of Loss." The applicable Causes of Loss form provided in part:

> A. COVERED CAUSES OF LOSS
>
> When Special is shown in the Declarations, Covered Causes of Loss means RISKS OF DIRECT PHYSICAL LOSS unless the loss is:
>
> 1. Excluded in Section B, Exclusions; or
>
> 2. Limited in Section C, Limitations.
>
> B. EXCLUSIONS
>
> 1. We will not pay for loss or damage caused directly or indirectly by any of the following. Such loss or damage is excluded regardless of any other cause or event that contributes concurrently or in any sequence to the loss.
>
> * * *
>
> e. Off-Premises Services
>
> The failure of power or other utility service supplied to the described premises, however caused, if the failure occurs away from the described premises.
>
> But if loss or damage by a Covered Cause of Loss results, we will pay for that resulting loss or damage.

Defendant asserted, and the trial court agreed, that the termination of electrical service constituted a failure of service that occurred away from the insured premises. Given that the policy does not limit the cause of the failure in any manner, we do not disagree with the trial court's finding that the deliberate interruption of power constituted a "failure of power." However, the failure must occur away from the insured premises. Because defendant did not provide any evidence to show electric service was terminated at a location away from the insured premises, it failed to establish a right to judgment under the off-premises services exclusion. We therefore find that the trial court erred in granting defendant's motion for summary disposition.

Defendant contends that even if coverage is not excluded under the off-premises services exclusion, coverage is excluded under the artificially-generated current and acts or decisions exclusions. Because the trial court did not rule on this aspect of defendant's motion, it has not been preserved for review. *Herald Co, Inc v Ann Arbor Pub Sch*, 224 Mich App 266, 278; 568 NW2d 411 (1997). Given that plus the fact that plaintiff did not have an opportunity to address these exclusions because they were first raised below in defendant's reply brief, we decline to consider them for the first time on appeal.

Reversed and remanded for further proceedings consistent with this opinion. Jurisdiction is not retained.

/s/ Mark J. Cavanagh
/s/ William B. Murphy
/s/ Michael R. Smolenski